

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MIGUEL GOMEZ CERVANTES,

Petitioner,

v.

JACK BENNETT, Acting Field Office  
Director, United States Immigration and  
Customs Enforcement, et al.,

Respondents.

CASE NO. C10-1439RSM

ORDER ADOPTING REPORT AND  
RECOMMENDATION BUT  
GRANTING LEAVE TO AMEND

This matter is before the Court for consideration of a Report and Recommendation (“R&R”) filed by the Honorable James P. Donohue, United States Magistrate Judge, together with petitioner’s objections thereto. Dkt. ## 17, 18. The Court shall adopt the thorough and well-reasoned recommendations of the Magistrate Judge regarding jurisdiction, but shall dismiss the petition with leave to amend for reasons which are set forth below.

Petitioner Miguel Gomez Cervantes is a native and citizen of Mexico, married to a lawful permanent resident of the United States. He has been detained since April, 2010, pending removal. He filed, through counsel this petition for habeas corpus pursuant to 28 U.S.C. § 2241,

1 asking the Court to order his release from detention under reasonable conditions, and to enjoin  
2 respondents from transferring him out of the jurisdiction of this Court. Dkt. # 1. The petition  
3 does not appear to challenge his final order of removal. This Court issued a temporary stay of  
4 removal pending consideration of the petition. Dkt. # 3. Respondent then moved to dismiss the  
5 petition, asserting that neither this Court nor the Immigration Court has jurisdiction to review  
6 petitioner's detention. Dkt. # 13. The R&R analyzes this argument and agrees, concluding that  
7 petitioner's continued detention does not constitute a due process violation, and further his  
8 removal cannot be challenged in this Court pursuant to the REAL ID Act of 2006, codified at  
9 8 U.S.C. § 1252(a)(5). The Court fully adopts the Report and Recommendation as to this  
10 conclusion. However, the Court declines to dismiss the petition with prejudice as recommended,  
11 as it is not absolutely clear that he can state no facts which would constitute a claim for habeas  
12 relief.

13 In his objections to the R&R, petitioner arguably raises a claim of ineffective assistance  
14 of counsel, related to his former attorney Antonio Salazar who has recently been disbarred for his  
15 acts and omissions in the handling of client matters, particularly with respect to immigration  
16 clients.<sup>1</sup> The Ninth Circuit Court of Appeals has held that the REAL ID Act may not preempt  
17 habeas jurisdiction in cases based on constitutional claims rather than a challenge to the removal  
18 order. "[I]n *A. Singh*, we reasoned that there was jurisdiction to review a claim of ineffective  
19 assistance of counsel for failure to timely petition for review because 'a successful habeas  
20 petition in this case will lead to nothing more than "a day in court" for Singh, which is consistent  
21 with Congressional intent underlying the REAL ID Act.'" *V. Singh v. Holder*, ---F. 3d ---, 2011

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23 <sup>1</sup> The Magistrate Judge did not have an opportunity to review this assertion as it was first  
24 raised in objection to the R&R. In the interest of expediting the matter, the Court has addressed  
it directly rather than renewing the referral to the Magistrate Judge.

1 WL 1226379 (9th Cir. 2011); *quoting A. Singh v. Gonzales*, 499 F. 3d 969, 979 (9th Cir. 2007).

2 Because petitioner may be able to state a claim of this type, the Court shall grant him leave to  
3 amend the petition.

4 Accordingly, it is hereby ORDERED:

5 (1) The Report and Recommendation is approved and adopted;

6 (2) Respondent's motion to dismiss is GRANTED and the petition for habeas corpus is  
7 DISMISSED with leave to amend;

8 (3) The amended petition shall be filed within thirty (30) days of the date of this Order;  
9 and

10 (4) The temporary stay of removal shall REMAIN IN EFFECT until further Order of this  
11 Court.

12 The Clerk shall direct copies of this Order to counsel of record and to the Honorable  
13 James Donohue.

14 Dated this 7<sup>th</sup> day of April 2011.

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17 RICARDO S. MARTINEZ  
18 UNITED STATES DISTRICT JUDGE  
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